OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 95-85 November 6, 1995

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: B. Allan Benson, Acting Associate General Counsel

SUBJECT: Statement of the General Counsel

For your information, attached is the statement of the General Counsel recently presented to the Subcommittee on Employer-Employee Relations Committee on Economic and Educational Opportunities, U.S. House of Representatives in response to hearings held on September 27, 1995. In an effort to conserve our scarce resources, the statement will not be duplicated and distributed in hard copy. However, employees may read the statement on the bulletin board or may read it in the Daily Labor Report which published the text in the October 26, 1995 edition. The General Counsel wishes to emphasize that this testimony was an opportunity to comment upon our staffing and budgetary shortages and the effects of our backlog. That focus, and the lack of comment on the respondents' contribution to delay, in no way should be interpreted as any agreement with the criticisms which may have been made as to the manner in which any of the cases were handled by the Regional staffs.

B. A. B.

Attachment

Statement of

GENERAL COUNSEL FRED FEINSTEIN
NATIONAL LABOR RELATIONS BOARD

Subcommittee on Employer-Employee Relations
Committee on Economic and Educational Opportunities
U.S. HOUSE OF REPRESENTATIVES
September 27, 1995

Chairman Fawell, Mr. Martinez, and Members of the Subcommittee:

Thank you for giving me this opportunity to submit written testimony for the record.

At the outset, I want to stress that, as a former staffer of this Subcommittee, I recognize and appreciate the vital role of Congressional oversight. The Board Members and I have tried to cooperate fully with this Subcommittee and others having oversight responsibility, as acknowledged by Chairman Hoekstra at the July oversight hearing on the NLRB, when he commended the Agency's responsiveness to his subcommittee's requests for information. With these thoughts in mind, I would like to respond to the concerns raised by members of the Subcommittee and witnesses at the September hearing.

As you know, the NLRB is a law enforcement agency. As General Counsel, I act as prosecutor, exercising my authority through the Regional

Offices and the General Counsel's Headquarters staff. A significant part of my duties as prosecutor is to investigate charges of unfair labor practices (ULPs) and decide whether or not a complaint should issue.

Since taking office as General Counsel, I have sought to exercise all of the important responsibilities of this office in a manner that is fair, evenhanded, effective, and consistent with longstanding principles of the Office of the General Counsel.

Prosecutorial Decisionmaking

As General Counsel I often am called upon to make decisions in controversial disputes. The General Counsel's prosecutorial role is to act as the guardian of a regulatory statute, not to advance a political agenda. General Counsels in the past have earned respect not because of the result they reached in any particular case but because they approached the cases that came before them with a sense of professional responsibility to enforce the Act. To be sure, a General Counsel's views about the relative importance of the, sometimes conflicting, policies embodied in the statute influence his or her construction of the statute and decisions about the best means to enforce the Act. The guiding principle for the General Counsel's actions, however, is the statute.

I am honored to be a part of this tradition and I fully embrace the role that my predecessors have adhered to. Like my predecessors, I do not expect

universal agreement with my priorities, much less with each individual decision I make. But like them, I recognize an obligation to make decisions that are a reasoned attempt to give effect to the policies expressed in the statute itself. And like them, I feel an obligation to take seriously the criticisms that are made about the performance of my office and to ensure that the Office of the General Counsel is now, as in the past, a responsible steward of the powers entrusted to it.

Efficient Use of Limited Resources

Like other public prosecutors, I am concerned about achieving maximum compliance with the law with the available resources. In each of the past two fiscal years, approximately 36,000 unfair labor practice charges and 6,000 representation petitions were filed. During the past 14 years, the NLRB has downsized from an authorized FTE of 2,945 to 2,054. Moreover, although case intake declined in the early 1980's, it leveled off thereafter, and is now growing. The net effect of the steady FTE reduction, unaccompanied by a commensurate decline in case intake, has been that the case handling burden per FTE has risen markedly: the intake per FTE for 1995 was about 26 percent above the figure for 1985. In addition, we have observed that cases have become increasingly complex over the years, due to changes in business organization, more bankruptcy filings, and other factors.

As previously stated, investigations are a key part of the work of the Regional Offices—perhaps *the* key part. As a result of our investigations, *nearly two thirds of all charges are dismissed or withdrawn due to lack of merit.* The Agency's "merit factor," the percentage of all charges found to have merit, has remained essentially constant over many years. It has not changed during my tenure as General Counsel, as the attached table shows.

Carefully conducted investigations are an essential component of our work because "bad calls" at the investigative stage have two results: 1) improper dismissals mean that wrongs go unremedied; and 2) improvident findings of merit mean fewer settlements and more litigation losses and an unnecessary drain on our resources. A lower settlement rate would cost the Agency dearly in terms of more cases that would have to be tried. Our settlement rate and litigation success rate are important performance indicators, and have remained constant. See attached tables. In FY 1995, 92.4 percent of meritorious cases were settled. We estimate that each percentage drop in the rate at which cases are settled costs the Agency in excess of $2 million in increased litigation costs.

The Agency's investigative procedures, as they have evolved over many years, are designed to balance thoroughness, efficiency, and respect for the rights of all parties. Because of the centrality of our investigations and merit determinations, our field investigators historically have been loath to accept, at face value, the untested statements of charging parties, be they employer,

employee, or union. For years the sworn affidavit, taken by a Board Agent, has been the cornerstone of our investigations. The pressures of staffing and other budgetary considerations have forced some revision of our investigative practices in recent years, as I discuss below. However, I am determined to maintain the quality and integrity of our investigative processes. Like other prosecutors, I am most reluctant to undertake litigation unless at least the core of the evidence bears substantial indicia of veracity.

As is true of other law enforcement agencies, the Board's processes balance the needs of confidentiality and openness. The Supreme Court has approved, and has noted Congressional approval of, the NLRB's long-standing policies regarding pretrial disclosure of witness statements. (See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978).) But while confidentiality is important, the Agency also has long recognized that it is impossible to conduct a thorough investigation, eliciting the cooperation of the charged party, unless there is some disclosure of the alleged violations under investigation. Similarly, where probable cause has been found, it is impossible to negotiate a settlement without some disclosure of the strengths and weaknesses of a case. I believe the Agency's disclosure policies have served the public well over the years. As noted above, the high settlement rate attests to the confidence that respondents place in the accuracy of our investigations.

In this respect, I must take issue with the testimony of Mr. Thierman concerning the *Petrochem* case. As the attached letter from Regional Director James Scott to Representative Frank Riggs suggests, and as is further supported by the District Court's grant of a 10(j) injunction—under the "high" 9th Circuit standard—I believe that the Region was warranted in proceeding as it did in that case.

Delay in Completing Investigations

The timely completion of investigations is of paramount importance to me. I am in full agreement with the concerns about delay raised regarding the *Durham* case from Los Angeles. It has taken far too long for this case to be resolved. The central point expressed by Mr. Durham—that delayed resolution by the Agency inures to the detriment of employer and employee alike—could have been taken verbatim from my public statements. It is for this very reason that a major focus of my term has been the exploration of ways in which cases like this, which impact a large number of employees and determine whether or not a collective bargaining relationship will exist, can be resolved with dispatch.

A major part of the problem, as I have alluded to elsewhere, is resources. With respect to the *Durham* case in particular, Region 21 is one of a number of Regions that have been plagued by staffing shortages that have delayed the timely completion of cases. The Region's current professional staff (attorneys and investigators) is 10 percent below our budgeted allowance and 14 percent

below the staff needed to process its cases. Over the past year we have lost 6 experienced professionals in that Region alone. The backlog of overage cases pending investigation in Region 21 has risen to over 25 percent of its total investigative workload. In other words, the parties in more than one case in four are experiencing delays in their cases because of our diminution of resources.

The Region 21 story is representative of the plight we face throughout the country. On a national basis approximately 20 percent of all cases pending investigation are similarly backlogged. In some Regions the figure exceeds 40 percent. While we are doing everything possible to streamline our operations, the fact remains that current funding levels simply do not permit us to keep current with the caseload.

Similarly, in the *Uno-Ven* case, in which the Region completed its investigation and merit determination six days after the charge was filed alleging illegal secondary picketing by the union, additional staffing could well have enabled a quicker merit determination. However, for the reasons mentioned above, it would have been irresponsible to take the charging party's allegations at face value, without any independent inquiry by a field investigator. Unfortunately, we have had cases over the years in which the affidavits provided by charging parties, including in secondary picketing cases, were found to have been inadequate or inaccurate.

As stated previously, since becoming General Counsel, conducting investigations on a timely basis, while preserving the quality of investigations, has been a major focus of mine. Underlying this focus of our efforts is the grave concern about the delay and disruption that can result from our inability to resolve cases expeditiously. It is for this reason that we have concentrated on streamlining and improving our operations to maximize our efficiency at this time of diminishing resources. There has been extensive consultation with Agency staff as well as those who appear before the Agency about how we can accomplish these goals.

We have initiated and are continuing to consider a number of operational changes that are directed specifically at improving our efficiency. We readily acknowledge that there remains room for further improvement, but ultimately our performance will be significantly affected by the level at which the Agency is funded.

As I have described in previous testimony before the Oversight Subcommittee, what follows is a summary of operational initiatives that have been implemented in recent years and those that are under current consideration.

- We continue to stress our Public Information Program so that clearly unwarranted charges are weeded out of the system before they are even filed.

We receive over 200,000 inquiries each year; however, through the efforts of our information officers, only slightly more than 5 percent result in the filing of an unfair labor practice charge.

- The Agency has significantly "streamlined" office and organizational structures in recent years. In 1988 the Agency redefined the boundaries of two thirds of our Regional Offices. Because the reorganization achieved a better balance in case intake among the regions, the managerial resources associated with each regional office were fully and efficiently utilized throughout the field operation. The inefficiencies of having offices which were too large or too small were virtually eliminated. The reorganization also aligned geographic areas with field offices in closest proximity, thus providing more convenient service to the public while at the same time reducing nonproductive employee travel time.

- In 1990, the Office of the General Counsel eliminated one of six executive managerial units (Districts) in the Division of Operations-Management, which has management responsibility over the entire field operation. By reassigning management responsibility to the remaining five management teams, we achieved a 16 percent reduction in vertical layering. In 1994, another District within the Division of Operations-Management was eliminated, reducing the management structure by another 20 percent, for a total reduction of 33 percent over 4 years.

- We also have an effective program for utilizing available field staff as efficiently as possible through various means of interregional cooperation. Coordinated investigation, settlement or litigation of "national" cases using one lead region while conserving significant resources elsewhere is a standard practice. So is the transfer of "portable" work such as decision writing and telephonic investigations from a temporarily understaffed or backlogged region to one which can better handle the increased workload. We also transfer some litigation work between Regions, particularly where trials must, in any event, be scheduled in geographic areas requiring substantial travel from the original office. Unfortunately, the number of offices which can be reasonably expected to absorb additional case work is diminishing.

- In order to free up Regional resources for direct casehandling work to the greatest extent possible, we have also focused on eliminating administrative clearances and reviews and other reports and submissions except where essential to the accomplishment of the Agency's mission. In keeping with these tenets, additional casehandling and administrative authority has been delegated to our Regional Offices over the past year. These delegations have eliminated prior requirements that clearance or approval must be secured from Washington. For example, Regional Offices have been delegated increased authority to issue investigative subpoenas and to decide whether to approve requests from outside parties for the testimony of Board employees or for the production of documents

from Agency investigative files. Regional Offices have also been delegated the authority to approve bilateral formal settlement agreements, which result in court-enforced Board orders, and to submit these settlements directly to the Board. In addition, we have eliminated requirements that many documents be submitted to Washington headquarters offices on a regular basis. These and other similar measures have substantially reduced the amount of paperwork flowing from the Regional Offices to headquarters.

- To reduce our travel expenditures and travel time, parties who file unfair labor practice charges (charging parties) and who are situated within a 120-mile radius of a field office are being encouraged to come to that office to provide their evidence. If a charging party is unable or unwilling to visit the Regional Office, we do not dismiss the charge. We do advise such a party, however, that the investigation may be delayed until a trip to his/her particular area is warranted, taking into account the need to coordinate travel. Similarly, Regional Offices encourage the scheduling of hearings within the 120-mile radius also to be held at the field office whenever it is practical.

- With respect to the coordination of travel, we have reëmphasized the need for Regional Offices to cluster cases on a geographic basis, depending upon the particular needs of the case. While this inevitably results in delay in some cases, it also saves substantial resources.

- We have initiated an experiment in the resident agent concept, whereby Board agents who are permanently located in cities distant from the Regional Offices work out of their homes and report to the Regional Office via telecommunications. This practice can reduce both travel costs and the time it takes to process cases, conserving scarce budget and staffing resources and improving our service to the public.

- After much deliberation, and with some hesitation, we have modified the Agency's long-standing policy with respect to investigative affidavits. Traditionally, affidavits have been obtained in face-to-face meetings, where the Board agent interviews the witness, prepares an affidavit and has the witness read and execute the document under oath. While effective, this method is costly, utilizing substantial time and expense to travel to distant witnesses. Accordingly, we recently authorized Regional Offices to take affidavits from witnesses over the telephone in appropriate situations.

- In addition to the foregoing, in cases where it is determined that a case can be investigated without the necessity for a formal affidavit (i.e., where facts are not in dispute, where undisputed documents underlie the alleged unlawful conduct, etc.), we are utilizing other options to investigate such cases efficiently with a minimal amount of time and effort by the Board agent. For example, one technique involves the preparation of a statement of facts from the charging party rather than a detailed affidavit. Under this procedure the Board agent would

interview the charging party over the telephone, record the substance of the conversation in summary form that was less comprehensive than a Board affidavit, and then send the factual summary to the charging party for his/her review and invite the charging party to supplement the factual summary if any of the information was either incorrect or incomplete. The statement of facts procedure would be utilized in cases that do not require a detailed, comprehensive affidavit and where it is unlikely that the Regional Office will need to resolve credibility disputes in order to decide the merits of a case.

- Another investigative approach I have recently authorized lieu of taking affidavits is to request the charging party to provide the Regional Office with a statement of position with respect to the charge. Again, this procedure would be used primarily in cases where the facts either are not in dispute or are set forth in documents that can be attached to the position statement. I also recently authorized the use of pre-printed questionnaires in lieu of witness statements as an additional method of conducting some investigations.

- We have been developing an "outcome-oriented" program for managing our cases which is designed to ensure that where we do have backlogs, cases of greatest public impact are not unduly delayed. We believe that where resources are insufficient to get all of the work done in a timely manner, the Agency has a responsibility to focus those limited resources on the cases having the greatest potential impact on employers and employees. As this program is implemented

in the future we will be better able to avoid delays in "high impact" cases like the *Durham* case. Not only will we be ensuring that such cases are handled timely, but we will be utilizing the new investigative techniques discussed above to manage many of the cases which would still remain in the "backlog."

- In June I announced a new policy concerning the processing of cases that involve an allegation that an employer has failed, in violation of Section 8(a)(5), to make contractually required contributions to employee benefit funds. I decided that where there is concurrent judicial relief available under either ERISA or Section 301 of the NLRA, Regions should not issue complaints seeking collection of such payments, but should expect unions or benefit funds to seek their own remedies.

In sum, as we hope this brief summary of some of the initiatives that have been undertaken suggests, we are taking significant steps to streamline our investigative and casehandling procedures in order to best manage our caseload. Nevertheless, because of insufficient resources, too often we continue to face substantial delays in investigating and deciding cases, as was unfortunately true in the *Durham* case.

Injunction Litigation:

Some of the Subcommittee members and witnesses questioned my approach to §10(j) cases and questioned whether we are making decisions on

whether to seek §10(j) authorization in a professional and responsible manner. The first point on which I wish to assure the Subcommittee is that our increased resort to §10(j) is the result of our implementing a uniform system for identifying and investigating potential §10(j) cases. We have undertaken to develop a more systematic enforcement of injunctive relief out of recognition that it is an important element in successful enforcement of the Act in a manner that is cost effective.

Like the NLRB General Counsels appointed by both President Ford and President Carter,[1] I believe that greater use of the Board's injunctive powers in appropriately-selected cases tends to reduce delay and is an effective, economic way of bringing about prompt, meaningful compliance with the provisions of the National Labor Relations Act.[2] For as my predecessors learned, where the violations are of the sort that warrant 10(j) relief, the real prospect of an interim injunction from a district court in a matter of months—as opposed to an eventual

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1 William A. Lubbers, *Discretionary Injunction Authority Under Section 10(j)*, 35 Lab. L.J. 259, 266-267 (1984); John S. Irving, *A Look at Four Years of Progress in the General Counsel's Office and What's Ahead*, Labor Law Developments 1980 (Southwestern Legal Foundation) at 141-142.

2 As a bipartisan committee of the Association of the Bar of the City of New York observed 20 years ago, "As a general proposition, we feel that expanded utilization of 10(j) would reduce the case load of a grossly overworked agency . . . .[It] would serve as a deterrent to frivolous litigation and aid in eliminating delay." Committee of Labor and Social Security of The Association of the Bar of the City of New York, *National Labor Relations Board Remedies* (1974), *reprinted in* Subcomm. on Labor-Management Relations, House Comm. of Education and Labor, 94th Cong., 2d Sess., Oversight Hearings on the National Labor Relations Act, 1976 (Comm. Print 1976) at p. 859.

decree from a court of appeals in a matter of years—often causes respondents to reconsider their previously announced decision to litigate. Settlements that were previously unobtainable suddenly become possible. An incidental benefit of the 10(j) remedy, in short, is that it spurs the parties to more realistically assess their legal position. That often leads to a positive outcome for all parties and the public—"[w]e save money, everyone saves time, and the unfair labor practices complained of are promptly remedied."[3]

Section 10(j) was added as a remedy during the 1947 amendments because Congress was aware

> that by reason of lengthy hearing and litigation enforcing its orders, the Board has not been able in some instances to correct unfair labor practices until after substantial injury has been done. . . .[I]t has sometimes been possible for persons violating the Act to accomplish their unlawful objective before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the status quo pending litigation.[4]

To address that problem, Congress provided that, after the issuance of an unfair labor practice complaint, the Board had the authority to petition the appropriate district court for temporary relief or restraining order.

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[3] John S. Irving, *A Look at Four Years of Progress in the General Counsel's Office and What's Ahead*, Labor Law Developments 1980 (Southwestern Legal Foundation) at 142.

[4] Senate Report No. 105, 80th Cong., 1st Sess. 27 (1947), reprinted in I Legislative History of the Labor Management Relations Act of 1947, 433 (G.P.O. 1948).

Although my predecessors have each endorsed the use of §10(j) to protect the efficacy of the Board's ultimate order, commentators have argued for many years that the remedy of the §10(j) interim injunction has been underutilized.[5] Over the years, there have been other, equally candid acknowledgments of the likely benefits of a §10(j) program that, like ours, endeavors systematically to promptly identify cases where interim relief is warranted. For example, in hearings before the Senate on Labor Law Reform in 1977, a spokesperson for the National Association of Manufacturers stated that

> "[A] change in NLRB attitude toward seeking 10(j) relief, as the Act says it should, as well as speeding up its processes in the handling of 10(j) requests, may be the answer to those who clamor for expeditious action under the Act. If the public, employers and unions were made more aware of 10(j) and its potential, it may result in a change in the labor relations atmosphere."[6]

Similarly, the American Retail Federation testified before this Subcommittee:

> "[T]he Board should be required to review all unfair labor practice cases in light of its injunctive relief authority under 10(j). It could be required, if thought necessary, to provide justification for not seeking

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5 See Catherine Hodgman Helm, *The Practicality of Increasing the Use of NLRA Section 10(j)*, 7 Ind. Rel. L.J. 599, 640-654 (1985); Note, *The Case for Quick Relief: Use of Section 10(j) of the Labor-Management Relations Act in Discriminatory Discharge Cases*, 56 Ind. L.J. 515, 518-522 (1981); Comment, *Section 10(j) of the National Labor Relations Act: A Legislative, Administrative and Judicial Look at a Potentially Effective (But Seldom Used) Remedy*, 18 Santa Clara L. Rev. 1021 (1978); Donald J. Siegel, *Section 10(j) of the National Labor Relations Act: Suggested Reforms for an Expanded Use*, 13 B.C. Indus. Com. L. Rev. 457 (1972).

6 Subcomm. on Labor, Senate Comm. on Human Resources, 95th Cong., 1st Sess., *Hearings on S. 1883: Labor Reform Act of 1977 Part 1* (Comm. Print 1977) at 699-700 (Statement of National Association of Manufacturers).

> that relief wherever it has concluded the seeking of such relief is unwarranted."[7]

The means by which we sought to improve our consideration of injunctive relief was to make its application more systematic and uniform. Use of the §10(j) remedy among the Regional offices prior to 1994 had varied significantly. Relatively few offices accounted for the bulk of authorized cases and some Regions submitted no cases to Washington for consideration of §10(j) relief. To address this lack of uniformity, my staff prepared and distributed a §10(j) Manual comprised of materials prepared by my predecessors, and conducted training for Regional personnel devoted to investigating and litigating §10(j) cases. Regions were educated in the early identification of cases that would be appropriate for §10(j).

With this intensive educational program, it is not surprising that the number of §10(j) authorizations increased. As a result §10(j) authorizations are more evenly distributed among Regional offices now than they were before the initiative began. This largely accounts for the increase in the number of §10(j) cases.

Some of our critics have accused us of forgetting that the §10(j) injunction is an extraordinary remedy and of making such injunctions commonplace. I am

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7 Subcomm. on Labor-Management Relations, House Comm. of Education and Labor, 95th Cong., 1st Sess., *Hearings on H.R. 8410: Labor Reform Act of 1977, Part* I,

concerned that that perception exists, and I do not believe it to be the case. The number of injunction requests has increased but that number still constitutes less than three percent of the total unfair labor practice complaints issued.[8] So the 10(j) injunction remains an extraordinary remedy by any realistic measure.

It should be noted, moreover, that the number of 10(j) actions authorized by the Board in FY 94 and FY 95—83 and 104, respectively—is comparable to the 80 authorizations in FY 79 and the 81 authorizations in FY 80. That high level of 10(j) activity, reached during the Ford and Carter administrations, was at that time expected to increase.[9]

The increase in the number of §10(j) cases has led some to express concern that the increase has been achieved only by our improperly cutting procedural and substantive corners. I assure the Subcommittee that that is not the case. Our Regional Offices have been instructed to conduct a thorough

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(Comm. Print 1977) at p. 354 (Statement of John W. Noble, Jr., for the American Retail Federation).

[8] In Fiscal 1994, when there were 3539 complaint cases, the Board authorized 10(j) in 83 cases--or only 2.4 percent of the total. (A smaller number of 10(j) cases 67—was actually filed, usually because the case settled after Board authorization of 10(j)). In Fiscal 1995, according to preliminary figures, there have been approximately 3587 unfair labor practice complaints and 104 10(j) authorizations—or 2.9 percent of the total number of complaint cases.

[9] See John S. Irving, *A Look at Four Years of Progress in the General Counsel's Office and What's Ahead*, Labor Law Developments 1980 (Southwestern Legal Foundation) at 142 (predicting "that you will see even greater utilization of Section 10(j) injunctions by the Agency in the future, and I also predict that the courts will become more and more used to granting them when filing becomes necessary.").

analysis of the facts and law supporting the alleged violation and the proffered defenses, and to articulate the reasons why interim relief is necessary.

To be sure, like General Counsels before me, I have lost some §10(j) cases and my critics cite each loss as evidence that our 10(j) program as a whole is illegitimate. In my judgment, an impressionistic "inspection by sample" approach is not a fair or accurate method for measuring the integrity of our §10(j) program. The uncertainties of litigation—particularly litigation conducted under great time pressure as injunction litigation necessarily must be—make it practically inevitable that there will be some losses. A fairer measure of the integrity of a 10(j) program is the Agency's overall success rate. On that score I find it significant that the success rate of our §10(j) program this past year—89 percent as of the end of Fiscal 95—is similar to the Agency's historic success rate. I am particularly pleased that in the cases that did not settle and had to be fully litigated in federal district court, we won 31 cases and lost only 9. That means we won 78 percent of our litigated cases.

In order to further assure the Subcommittee on that point, I would like to discuss with you our §10(j) decision making process—that is, what we look at to arrive at the conclusion that a case warrants §10(j) authorization. The answer is that we look at the same things that a court sitting in equity looks at in considering the propriety of a preliminary injunction: the strength of the merits of

the alleged violation, and the threat of remedial failure balanced against the potential harm that an injunction would cause the respondent.

The touchstone of §10(j) analysis is the question of "remedial failure": does a case present a threat that if we wait until the Board issues its ultimate remedial order, that order will be too late to be effective in restoring the pre-unfair labor practice status quo? Our training materials direct our field agents to look, as a starting point for evaluating this issue, to the 15 categories into which the Board has traditionally classified its §10(j) cases. These categories were originally developed to classify the cases litigated during the term of General Counsel John Irving (FY 76-80) and have been used by every General Counsel since then.

It is important to understand that deciding that a case falls within one of the §10(j) categories is only the beginning of the analysis. Our §10(j) training and materials emphasize that a necessary part of evaluating whether a case warrants §10(j) relief is a thorough analysis of the facts and law supporting the alleged violation and the proffered defenses.

The clarity of the facts is an important factor, and I have declined to seek §10(j) relief in cases that present particular merits problems. A recurring pattern involves serious claims of discrimination that are met with credible defenses. For example, we recently issued a complaint alleging that an employer had laid off a

group of employees to thwart a union campaign. Although the evidence certainly was strong enough to warrant a complaint, there was also evidence that the employer had planned the reduction in staffing prior to the campaign as a response to financial difficulties. For this reason, I decided not seek §10(j) relief. Similarly, although we have often sought and obtained §10(j) relief against successor employers who refuse to recognize and deal with the predecessor union, I declined to seek authorization in a recent case where it was unclear which of several unions had been the representative of the predecessor's employees.

In a similar vein, I am particularly sensitive to the need for a careful analysis in cases involving operational changes such as subcontracting, relocation or partial closure. Changes in our economy seem to have brought us more of these cases in recent years. They are fact-intensive and the remedy of restoring discontinued operations, which we occasionally seek, is likely to be significant to a respondent. It is thus particularly important to evaluate the evidence regarding the asserted defenses to the unfair labor practice charges and to any claims that restoration would be unduly burdensome.

To be sure, I would not decline to seek authorization simply because a case presents difficult issues if the case also presents a real threat of remedial failure. Thus, for example, in a case concerning a hotel in the Commonwealth of the Northern Mariana Islands, the respondent employed foreign national

employees and was refusing to renew their annual employment contracts and work permits. We concluded that this was in retaliation for these employees' union and other concerted activities. The employer claimed that the Board lacked jurisdiction to adjudicate this dispute in part because to do so would impermissibly interfere with territorial law. Notwithstanding these novel jurisdictional issues, we sought, and the court granted, §10(j) relief because the employees faced immediate deportation to homes thousands of miles away. Absent interim relief, it was likely we would not even have been able to secure their testimony at the unfair labor practice hearing, much less effectively enforce a final reinstatement order from the Board.

These are some concrete examples of how we arrive at a decision to seek, or not to seek, §10(j) authorization. Let me also emphasize that, even in cases where we have obtained authorization, we have no vested interest in litigation for the sake of litigation and our attorneys are always prepared to explore options for adjusting the injunctive phase of the case or the entire dispute. I am eager to serve as an active broker in these disputes to discover whether there is common ground among the parties that will allow us to achieve our objectives without litigation. The recent settlement in *Overnite Transportation Co.* is an example of just such an adjustment—entered into voluntarily by the Company—that secures to employees the protections of the Act when they most need it—during an

ongoing organizing campaign—instead of at the conclusion of litigation, long past the time when it is relevant.

The *Overnite* settlement also has certain creative and novel features that demonstrate my commitment to resolving disputes without litigation. For example, we incorporated an ADR mechanism for a certain class of allegations of wrongdoing that may arise in the future, and are using the Federal Mediation and Conciliation Service to explore settlement of outstanding 8(a)(3) complaint allegations.

We played a similar role in another case, involving the announced relocation of a plant, scheduled to occur two months after we had obtained §10(j) authorization. We had issued complaint alleging that the employer had failed to satisfy its bargaining obligation regarding the relocation. It was clear that if we waited until the Board issued a final ruling, any order directing bargaining over the relocation would be futile because the employer would have long since completed the move and the employees dispersed. The imminence of §10(j) litigation and our involvement convinced both parties to return to the bargaining table where they reached an agreement under which the employer completed the move as scheduled and the employees received substantial severance pay and benefits.

As we hope these examples illustrate, we are endeavoring to carefully select the cases in which we seek §10(j) relief. Like any umpire, we may sometimes have missed a call and could benefit from an instant replay. But as I have explained, we are trying hard to play fairly and to faithfully carry out the purposes for which §10(j) was enacted.

We have approached our enforcement of §10(j) of the Act in a manner that is reasonable, responsible and wholly consistent with the Congressional intent in granting the Board discretionary authority to seek interim injunctive relief in cases where the normal processes would not be effective. It reflects the best practices of former General Counsels, and the thoughtful recommendations of outside commentators, and is subject to re-examination and modification in light of our experience. While I do not expect there could be agreement on every individual decision that we have made in this area, I would hope that you would recognize that our §10(j) program reflects a commitment to faithfully enforce the law in a cost effective manner and to ensure that the important purposes of the National Labor Relations Act are fulfilled.

Responses to Press Inquiries

During the oversight hearing, a question was raised about a press release recently issued by a Regional Office. The press release briefly set forth the basis for the Region's dismissal of a charge filed by an employer. The *Ryder* case had attracted considerable interest, including inquiries from national media outlets

including the *Wall Street Journal* and the *Journal of Commerce.* In an effort to be responsive to such inquiries and to efficiently provide the same information to multiple requesters, the Agency's Division of Information, which had received these press inquiries, asked the Regional Office to issue a brief statement summarizing its action in the case. The Region did so. I had no role in this action and was not aware of it until after the comments were made at the hearing. A copy of the press release is attached.

More generally, the policy of our Division of Information is to issue statements when there is public interest, demonstrated by public or press inquiries, or where experience has shown that there is likely to be public interest. This assures that the Agency speaks clearly and consistently on such matters. Over the years the Agency has, when appropriate, announced important litigation decisions or settlements through the use of press releases.

Conclusion

I hope this discussion of decision making in the Office of the General Counsel will help assure you that we are endeavoring to carry on the best traditions of the office. Criticism of the General Counsel's exercise of prosecutorial discretion comes with the territory. But while there have always been disagreements, I believe that there should be no disagreement that today,

as before, the Office of the General Counsel is committed to approach each case with a sense of professional responsibility and a commitment to the statute.

Regional Office Merit Factor

The Merit Factor is the percentage of all charges filed that are found to have merit in whole or part, following an impartial investigation.

Fiscal Year	Merit Factor
1984	34.1
1985	32.4
1986	33.7
1987	33.6
1988	35.2
1989	35.7
1990	35.4
1991	36.1
1992	33.4
1993	34.3
1994	33.9
1995	35.8

Regional Office Settlement Rate

The Settlement Rate is the percentage of meritorious charges filed that are settled.

Fiscal Year	Settlement Rate
1984	95.8
1985	94.4
1986	91.7
1987	92.7
1988	91.1
1989	93.2
1990	91.5
1991	93.2
1992	94.3
1993	92.1
1994	92.3
1995	92.4

Regional Office Litigation Success Rate

The Litigation Success Rate is the percentage of cases that are won in whole or part before the ALJ or the Board.

Fiscal Year	Litigation Success Rate
1984	72.0
1985	74.6
1986	82.4
1987	82.8
1988	79.8
1989	83.6
1990	83.4
1991	84.8
1992	86.3
1993	86.0
1994	86.3
1995	85.0